not cited but more nearly in point rest on special grounds inapplicable to the principal case.[20] The only case found, *Moore* v. *City of Atlanta* (1883) 70 Ga. 611, in which, where remote injury was actionable and prepayment for damage was clearly required, injunctive relief was denied, is weakened as authority because the decision was based on the balance of convenience. Further, the constitution in South Dakota plainly prescribes one rule for all property injured for public purposes, and implies no such distinction as is introduced by the court between actionable injury caused by acts on land already acquired, and such as results immediately from a taking of property.

EFFECT OF A LESSOR'S CONDUCT ON BREACHED CONDITIONS PRECEDENT TO THE LESSEE'S RIGHT OF RENEWAL.—Equity is slow to relieve a plaintiff who is in default,[1] for the position of one seeking to compel another to perform, when himself guilty of non-performance, although not unconscionable so as to call into play the doctrine of unclean hands, may perhaps be reprehensible, for he who seeks equity must do equity.[2] In the one case, in theory at least, the court, applying the doctrine of its own motion,[3] closes its doors upon the plaintiff *in limine*;[4] in the other the plaintiff has a standing in court and may be granted relief, provided he "does equity."[5] But non-performance of a condition precedent is regarded as a default of such a character as to bar relief by specific performance.[6] Under what circumstances then will relief be given in the case of a lessee demanding specific performance of a covenant to renew, where he himself has been guilty of a breach of covenant? It is well settled that such relief will be given under proper circumstances,[7] and the lessee's right may not be lost by the breach of an independent covenant.[8] But where a power of reentry is attached, the covenant acquires the force of a condition[9] and so a breach working forfeiture would cause a loss of that right, since the forfeiture of the term has that effect.[10] Where a lessee's right of renewal however is made expressly conditional on the performance of the covenants in the lease, such performance becomes a condition pre-

---

[20]Delaware Co.'s Appeal (1888) 119 Pa. St. 159 (no method provided for assessing compensation on application of condemnor); McMahon & Perrin *v.* R. R. Co. (1889) 41 La. Ann. 827 (no actionable damage at law or in equity).

[1]Fry, Specific Performance (4th ed.) § 922; Story, Eq. Jur. § 771.

[2]Pomeroy, Eq. Jur. §§ 385-8.

[3]8 COLUMBIA LAW REVIEW 40.

[4]Pomeroy, Eq. Jur. § 397. For a discussion of the circumstances under which relief may be granted where the defendant is in greater guilt, see 7 COLUMBIA LAW REVIEW 416.

[5]Pomeroy, Eq. Jur. § 386.

[6]Haines *v.* Barber (N. Y. 1906) 113 App. Div. 696; Williams *v.* Brisco (1882) L. R. 22 Ch. D. 441.

[7]N. Y. Life etc. Co. *v.* Rector etc. (N. Y. 1883) 12 Abb. N. C. 50.

[8]Lyons *v.* Osborn (1891) 45 Kan. 650; Trant *v.* Dwyer (1828) 1 Dow & Cl. 125.

[9]Kew *v.* Trainer (1894) 150 Ill. 150.

[10]Job *v.* Banister (1856) 3 Jur. (N. S.) 93.

cedent to the right of renewal.[11] Of course, the performance of a condition precedent may be waived,[12] or excused by words or conduct creating an estoppel,[13] but it does not follow that mere non-action or indulgence on the part of the lessor would have that effect,[14] for in that case the lessor would be forced to action in order to preserve a right for the lessee.[15]

In considering the question of waiver it is fundamental to note the attitude of the courts in distinguishing between conditions precedent and conditions subsequent, for they will afford relief under certain circumstances for breaches of the latter, but will not presume to do so in the case of non-performance of the former.[16] A condition precedent, even though imposed by the identical covenant, is entirely distinct from the condition working forfeiture, by virtue of the separate and individual relations to the rights involved and because of the different purposes for which they are created.[17] Therefore, a covenant to pay rent at a time specified may at once be a condition subsequent with reference to the continuation of the lease, and a condition precedent to the right of renewal. Where the lessee incurs forfeiture for the violation of a covenant to pay rent, a court of equity will in general relieve him on the theory that the condition subsequent was intended as a security for the payment,[18] and so avert a loss of the term. But obviously the scope of the relief is exclusive of the covenant as a condition precedent, in no wise affecting it, for otherwise the court would be making a new contract for the parties. And so where a course of conduct, not amounting to an express waiver on the part of the lessor, is equivalent to a license permanently depriving him of the right of forfeiture,[19] it would presumably not affect the condition precedent. And even the waiver of a covenant as an independent obligation has been held not to affect its force as a condition.[20] Apparently, too, the courts, favoring the lessor, if possible apply acts of waiver, such as payment of rent, to antecedent breaches giving rights of action or involving forfeiture. Assuming a case where the right to renewal was conditioned upon a covenant designed with sole reference to such right, it is conceivable that upon breach, and upon clear act of waiver on the part of the lessor, the court, in fixing the objective of such waiver, would be forced to apply it to the breach of the condition of renewal. But otherwise, it would seem that the waiver would not affect the condition precedent. Ordinarily where the de-

[11]People's Bank *v.* Mitchell (1878) 73 N. Y. 406; Bastin *v.* Bidwell (1881) L. R. 18 Ch. D. 238.

[12]Pechner *v.* Phœnix Ins. Co. (1875) 65 N. Y. 195.

[13]Dunn *v.* Steubling (1890) 120 N. Y. 232.

[14]Haines *v.* Barber *supra;* Pike *v.* Butler (1850) 4 N. Y. 360.

[15]See Perry *v.* Davis (1858) 3 C. B. (N. S.) 769.

[16]Fry, Specific Performance (3rd Am. ed.) 458, note, citing Wells *v.* Smith (N. Y. 1833) 2 Edw. Ch. 78.

[17]See McIntosh *v.* Rector etc. (1890) 120 N. Y. 7.

[18]Sunday etc. Co. *v.* Wakefield (1888) 72 Wis. 204; Peachy *v.* Duke of Somerset (1824) 1 Strange 447; Pomeroy, Eq. Jur. § 453.

[19]Harris *v.* Troup (N. Y. 1840) 8 Paige 423; but see Bleecker *v.* Smith (N. Y. 1835) 13 Wend. 530.

[20]McIntosh *v.* Rector etc. *supra.*

fault of the lessee is of such a nature as to give the lessor the right of re-entry and so work a forfeiture, some positive action is necessary for a waiver thereof,[21] as in the case of acceptance of rent subsequent to the breach working forfeiture, with knowledge thereof.[22] The right to take advantage of a forfeiture is an immediate one, however, and may be lost by failure to exercise it diligently.[23] But it would seem that the failure to perform a condition precedent gives no right to be taken advantage of immediately; it need not necessarily be asserted until demand for renewal. And so, in general, where a covenant is made a condition precedent to the right of renewal, the obligation to perform such a condition would be unaffected by a waiver of the forfeiture resulting from payment of rent without objection after breach.[24]

In a recent case, however, *Montant* v. *Moore* (N. Y., App. Div. 1909) 42 N. Y. L. Jur. No. 88, it was held that where a covenant to renew was expressly conditioned upon performance of covenants by the lessee, one of which provided for semi-annual payments at specified dates, the fact that payments, though always overdue, were invariably accepted without objection by the lessor, operated as an incorporation of a substituted agreement into the lease and as a waiver of the condition precedent. On the basis of a substituted agreement, the case seems clearly justifiable,[25] for the condition precedent would be dispensed with thereby and no default on the part of the lessee would appear. The court, however, further finds an independent waiver of the condition by virtue of the lessor's conduct in accepting the rent. It would seem that strictly no waiver was effected, the courts favoring the lessor, in that they are quick to note a non-performance or breach of condition, and slow to find a forfeiture.[26] But in view of the apparent tendency in New York to disregard technical failure of performance, and to give weight to the equities, liberally,[27] the decision of the court would seem sound in this respect also. There is apparently an additional argument in favor of the result reached, not touched on by the court, in that the lessor, with knowledge of the repeated defaults of the lessee, appointed an arbitrator for the purpose of fixing the rent for the new term, which would seem to be a strong acknowledgement on his part of the lessee's right to renewal.[28] However, in view of the lessee's breach after the appointment of the arbitrator, the lessor's action would have this effect only if it be deemed to waive the condition as a condition, and not merely past breaches thereof. But this reduces to an affirmance of a substituted day for payment.

---

[21]Doe *v.* Allen (1810) 3 Taunt. 78.

[22]Jackson *v.* Allen (N. Y. 1824) 3 Cow. 220; Ireland *v.* Nichols (1875) 46 N. Y. 413.

[23]Underhill, Landlord and Tenant § 412; Dunn *v.* Steubling *supra.*

[24]Finch *v.* Underwood (1876) L. R. 2 Ch. D. 310; Swift *v.* Occidental etc. Co. (1903) 141 Cal. 161; Pike *v.* Butler *supra;* Taylor, Landlord and Tenant §§ 47, 339; Underhill, Landlord and Tenant § 812; see Lawton *v.* Sutton (1842) 9 Mees. & W. 794.

[25]Smith *v.* Rector etc. (1888) 107 N. Y. 610; De Frece *v.* Nat. Life etc. Co. (1892) 136 N. Y. 144. *Cf.* Lyons *v.* Osborn *supra.*

[26]Job *v.* Banister *supra.*

[27]Gallagher *v.* Nichols (1875) 60 N. Y. 438; Harris *v.* Troup *supra.*

[28]But see Pike *v.* Butler *supra.*